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Constitutional Law

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IV. Construction of Constitutions

D. Construction to Determine Operative Effect

2. As Self-Executing or Not Self-Executing

a. In General

§ 102. Definition, nature, and effect of self-executing provisions of constitutions

[Topic Summary](#) [Correlation Table](#) [References](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640

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Implied cause of action for damages for violation of provisions of state constitutions. 75 A.L.R.5th 619

A constitutional provision is self-executing if no legislation is necessary to give effect to it¹ and if there is nothing to be done by the legislature to put it in operation² unless a contrary intent is clearly shown.³ A court can determine that a constitutional provision was intended to have immediate effect, and thus is self-executing, when the provision is both judicially definable and enforceable, even though its express language may be stated in relatively general terms.⁴ For instance, a constitutional provision is self-executing if it provides sufficient direction by which the right at issue might be protected.⁵ To be self-executing, a constitutional provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection.⁶ Thus, usually no legislation is required to effectuate a constitutional provision that is prohibitory in its language.⁷ However, the mere fact that a constitutional provision is prohibitory is not enough to demonstrate

it is self-executing, as required for a private right to sue for damages.⁸ Conversely, the failure of the legislature to act cannot take away a right constitutionally granted.⁹

A constitutional provision addressed to the legislature is nonself-executing.¹⁰ Likewise, a constitutional provision is not self-executing if it merely states a general principle without establishing any basis on which that principle may be enforced.¹¹ For instance, the protections of the Fifth Amendment are generally not self-executing.¹²

It is a well-established rule that constitutional provisions contemplating and requiring legislation to enforce them are not self-executing¹³ and remain inoperative except as implemented by appropriate legislation which carries out the general spirit and purpose of the provisions.¹⁴ A constitutional provision which assumes the existence of certain machinery to carry it out is not self-executing where the machinery previously provided by the legislature is not geared to the carrying out of the particular constitutional mandate.¹⁵ Even if a constitutional provision contains a mandatory requirement that the legislature adopt a particular provision, there is no remedy if the legislature fails to obey such constitutional mandate.¹⁶ However, the command of a constitutional provision which is not self-executing remains in force, even though it is for the legislature to choose the time and form for carrying out the command.¹⁷

A constitutional provision may be self-executing in one part and not self-executing in another part.¹⁸

It has been said that a court's ability to award damages for violation of a self-executing constitutional provision rests on the common law.¹⁹ Courts may give effect to a constitutional provision without implementing legislation, as required for a private right to sue for damages, if the framers intended the provision to have immediate effect and if no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.²⁰ When inquiring into whether a constitutional provision is self-executing, as required for a private right to sue for damages, courts ask whether the framers intended the provision to have immediate effect without implementing legislation or whether instead its terms would be understood as a general principle or line of policy requiring a legislative act to put it into effect.²¹ However, a determination that a state constitutional provision is self-executing does not necessarily mean that monetary damages are the proper remedy for a violation.²²

Observation:

The fact that a self-executing constitutional provision is operative without the need for supplemental legislation means that the provision is enforceable in a common-law action.²³ On the other hand, a challenge to a constitutional provision that is not self-executing fails to present a justiciable issue because the provision does not create a privately enforceable right.²⁴

2 In re Protest Filed by Citizens for Merit Selection of Judges, Inc., 49 Ohio St. 3d 102, 551 N.E.2d 150 (1990).
3 Ordinarily, a self-executing constitutional provision does not contain a directive to the legislature for further
4 action. *Zullo v. State*, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
5 *McDougall v. Marin County*, 208 Cal. App. 2d 65, 25 Cal. Rptr. 107 (1st Dist. 1962).
6 *Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation*, 2017 UT 75, 416 P.3d 401 (Utah 2017), cert. denied, 139 S. Ct. 784, 202 L. Ed. 2d 567 (2019).
7 *Zullo v. State*, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
8 *Zullo v. State*, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
9 § 107.
10 *Kuchcinski v. Box Elder County*, 2019 UT 21, 450 P.3d 1056 (Utah 2019).
11 *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942).
12 *Montana Independent Living Project v. Department of Transportation*, 2019 MT 298, 398 Mont. 204, 454 P.3d 1216 (2019).
13 *Zullo v. State*, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
14 *State v. Weichman*, 292 Neb. 227, 871 N.W.2d 768 (2015).
15 *Moosa v. Abdalla*, 248 La. 344, 178 So. 2d 273 (1965).
16 As to tests to determine whether provision is self-executing, see §§ 105 to 107.
17 *Uhlmann v. Conway*, 277 A.D. 478, 101 N.Y.S.2d 4 (3d Dep't 1950).
18 *O'Neill v. White*, 343 Pa. 96, 22 A.2d 25 (1941).
19 *Ursuline Academy of Cleveland v. Board of Tax Appeals*, 141 Ohio St. 563, 26 Ohio Op. 152, 49 N.E.2d 674 (1943) (overruled in part on other grounds by, *Denison University v. Board of Tax Appeals*, 2 Ohio St. 2d 17, 31 Ohio Op. 2d 10, 205 N.E.2d 896 (1965)).
20 *Palmer v. Board of Education of Union Free School Dist. No. 2, Town of Geddes, Onondaga County*, 276 N.Y. 222, 11 N.E.2d 887 (1937).
21 *In re Assessments For Year 2003 of Certain Properties Owned by Affordable Residential Communities 7, L.L.C. and Affordable Residential Communities 8, L.L.C.*, 2006 OK CIV APP 147, 150 P.3d 399 (Div. 2 2006).
22 *Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist.*, 2000 UT 87, 16 P.3d 533 (Utah 2000).
23 The fact that a constitutional provision is self-executing does not necessarily mean that monetary damages are proper remedies for its violation. *Shields v. Gerhart*, 163 Vt. 219, 658 A.2d 924 (1995).
24 *Kuchcinski v. Box Elder County*, 2019 UT 21, 450 P.3d 1056 (Utah 2019).
25 *Kuchcinski v. Box Elder County*, 2019 UT 21, 450 P.3d 1056 (Utah 2019).
26 *Zullo v. State*, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
27 *Gray v. Virginia Secretary of Trans.*, 276 Va. 93, 662 S.E.2d 66 (2008).
28 *Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008).